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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1038

ROBERT B. KEHLOR, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner Robert R. Krilich respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on November 28, 1972.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto at 1a-18a. No opinion was rendered by the District Court for the Northern District of Illinois, Eastern Division.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on November 28, 1972. A timely petition for rehearing was denied on December 27, 1972, and this petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, under the single-inspection rule of section 7605(b) of the Internal Revenue Code of 1954, revenue agents who (a) have not obtained higher authorization and (b) have not given the statutory notice to a taxpayer, may nonetheless inspect a taxpayer's books of account a second time simply because the investigation is formally directed at third parties and the taxpayer's books of account are in the possession of his accountant.

2. Whether a report prepared by a Special Agent of the Internal Revenue Service constitutes a "statement" of the Special Agent producible under the Jencks Act, 18 U.S.C. § 3500.

3. Whether a person convicted and sentenced for tax evasion in violation of Code section 7201 can be separately convicted and sentenced for the lesser included offense of filing a fraudulent return in violation of Code section 7206(1).

STATUTORY PROVISIONS INVOLVED

Internal Revenue Code of 1954:

§ 7201. ATTEMPT TO EVADE OR DEFEAT TAX.

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in ad-

dition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

§ 7206. FRAUD AND FALSE STATEMENTS.

Any person who—

(1) *Declaration Under Penalties or Perjury.*—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter;

* * * *

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

§ 7605. TIME AND PLACE OF EXAMINATION.

* * * *

(b) *Restrictions on Examination of Taxpayer.*—No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

United States Code, Title 18:

§ 3500. DEMANDS FOR PRODUCTION OF STATEMENTS AND REPORTS OF WITNESSES

(a) In any criminal prosecution brought by the United States, no statement or report in

the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

* * * *

(e) The term "statement," as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

* * * *

STATEMENT OF THE CASE

Petitioner was convicted of filing a fraudulent income tax return in violation of Code section 7206(1) and attempting to evade taxes in violation of Code section 7201. Both charges were based on an understatement of gains which resulted from an overstatement of the cost basis of land sold during 1963. Petitioner was sentenced to concurrent terms of eighteen months

imprisonment for each offense and was fined $5,000 for the violation of section 7206(1). The Court of Appeals affirmed.

In 1962 petitioner agreed to purchase from Sam Papanek 23.6 acres of land along River Road in Schiller Park, Illinois for $310,878. In accordance with the agreement, petitioner paid $51,000 to an escrow agent. A second and final payment of $259,878 was made to the escrow agent on petitioner's behalf by Berry Electric Contracting Company ("Berry") pursuant to a separate agreement with Berry under which petitioner gave Berry a promissory note in the amount of $354,926. This amount represented (a) the $259,878 deposited by Berry to consummate the purchase of the River Road land plus (b) $95,048 which petitioner owed to Berry for unrelated construction work done at the Lawrencewood Shopping Center in Niles, Illinois.

The initial entries in petitioner's books mistakenly debited the full $354,926 to the account of the Lawrencewood Shopping Center and properly credited notes payable to Berry in the same amount. On discovery of this error by petitioner's accountant, the full $354,926 was removed from the Lawrencewood Shopping Center account and debited to the River Road land account. Since the $95,048 was not separated from the $259,878, petitioner's books overstated the cost of the River Road land by $95,048.

In June 1963 six acres of the River Road tract were sold to Joseph D. Testa for $283,500, and in August 1963 another eight acres were sold to John Parrish Enterprises, Inc. ("Parrish") for $542,000. The cost basis used by petitioner in computing the gains on these sales in his 1963 income tax return reflected the erroneous inclusion of the $95,048 in the cost of the entire

tract. Additionally, the basis used in computing the gain on the land sold to Parrish improperly included $200,000 that petitioner claimed he was personally obligated to pay for sewer installations on the land.

On December 8, 1964, Revenue Agent Leigh Brown began a normal income tax audit of petitioner's personal returns for the years 1960 through 1963. Agent Brown thoroughly inspected petitioner's books and records, and made photocopies of relevant documents. The examination was carried out with the fullest cooperation of petitioner and his accountant, Mr. Schelly. Agent Brown prepared a Revenue Agent's Report disallowing the inclusion of the $200,000 sewer obligation in the basis of the River Road property. Due to this and other adjustments, the Revenue Agent's Report proposed a deficiency of $369,595 for 1963. The Revenue Agent's audit was completed on July 6, 1966. Petitioner sought administrative review of the Revenue Agent's adjustments; and, at the District Conference level of the Internal Revenue Service, an agreement was executed in December 1966 reducing the deficiency for 1963 to $53,670. This amount was subsequently paid, and the case was closed.

More than two and one-half years later, in July 1969, petitioner was interviewed at his office by Special Agents Witkowski and Oshiro of the Internal Revenue Service.[1] The Special Agents were formally investigating the possibility that Edward Bluthardt, the mayor

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[1] Special Agents are criminal investigators assigned to the Intelligence Division of the Internal Revenue Service. They are called in only when fraud is suspected. See Internal Revenue Service Statement of Organization and Functions, § 1118.6, 37 Fed. Reg. 20960, 20988 (1972). *See also Donaldson* v. *United States*, 400 U.S. 517, 535-537 (1971).

of Schiller Park, Illinois, had received unreported income as a result of the rezoning of the River Road property. Subsequently, Special Agent Oshiro served on petitioner's accountant, Mr. Schelly, an Internal Revenue summons dated August 12, 1969, calling for the production of petitioner's books and records "pertaining to construction, sale or acquisition of real estate in Schiller Park, Illinois. . . ." As required by this summons, Schelly on September 15, 1969, delivered certain of petitioner's records to Revenue Agent Seto who reexamined the same $200,000 basis item that had been adjusted in petitioner's civil audit for 1963. Although the investigation continued to be formally directed at Mayor Bluthardt, certain work papers of Agent Seto referred to petitioner as "the taxpayer."

During this period Agent Seto conferred with Special Agent Popovits,[2] who was investigating John and Sam Papanek while the latter was awaiting trial under a tax fraud indictment connected with the 1963 land sale to petitioner. It was suspected that Sam Papanek had understated the amount he had received from petitioner on the sale of the River Road tract. As conceded by the Government below, if Special Agent Popovits was wrong in this hypothesis, it would follow that petitioner had overstated his basis in the property on his 1963 return. (App. at 14a). Either Papanek had understated what he received from petitioner for the land or petitioner had overstated what he had paid; and, since Special Agent Popovits had received Revenue Agent Brown's workpapers from the prior audit, he already knew petitioner's cost basis had been challenged.

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[2] The opinion below incorrectly spells the Special Agent's name "Popovitz."

On November 17, 1969, Special Agent Popovits interviewed petitioner in the company of Special Agent Oshiro, the same agent who had served the August 12, 1969 summons and previously interviewed petitioner in connection with the asserted investigation of Mayor Bluthardt. Petitioner was told that the interview was being conducted as part of the investigation of Sam Papanek, but was given *Miranda* warnings at the outset—because, as the Court of Appeals noted, "of possible collateral criminal consequences to [petitioner] in the investigation of the Papaneks." (App. at 14a). On November 18, 1969, ostensibly in connection with the Bluthardt investigation, Revenue Agent Seto used the August 12th summons to obtain additional records belonging to petitioner and, on the same day, turned certain of petitioner's records over to Special Agent Popovits.

On December 2, 1969, Special Agent Popovits requested that a criminal investigation of petitioner be formally opened, and Popovits was subsequently assigned to head such an investigation. It was not until April 1970—long after petitioner's records had been examined a second time—that the written notice of second inspection required by Code section 7605(b) was delivered by Special Agent Popovits to Schelly, petitioner's accountant. Petitioner had never requested a second inspection. Popovits' investigation culminated in the return of an indictment against petitioner on June 23, 1970.

Prior to trial, petitioner moved to suppress all of his records and documents procured by agents of the Internal Revenue Service pursuant to the summons dated August 12, 1969, on the ground that the second inspection of his books and records violated the single-inspection rule of Code section 7605(b). The motion was

denied. The Court of Appeals sustained the District Court's ruling, holding that section 7605(b) had not been violated because the second inspection of petitioner's records was made as part of the investigations of Bluthardt and the Papanek brothers, not of petitioner. The Court of Appeals further ruled that section 7605(b) had no applicability because the bulk of the records had been in the possession of petitioner's accountant at the time the summons was served.

At trial, Special Agent Popovits testified for the Government concerning several phases of his investigation. Prior to cross-examination, counsel for petitioner sought production under the Jencks Act, 18 U.S.C. § 3500, of the Special Agent's Report ("S.A.R.") prepared by Popovits concerning the investigation of petitioner. Although several memoranda of interviews prepared by Popovits were turned over, the District Court declined to order the production of the S.A.R. The District Court referred to the S.A.R. as a "board summary of the whole investigation," and did not rule that it was irrelevant to the subject matter of Popovits' testimony. However, the court expressed doubt whether the S.A.R. was producible under the Jencks Act and apparently felt that petitioner was only entitled to the memoranda of interviews. (Tr. 283). The Court of Appeals, relying on its earlier decision in *United States v. Keig*, 334 F.2d 823 (7th Cir. 1964), held that the S.A.R. was not a "statement" of the witness producible under the Jencks Act.[3] (App. at 18a n.18).

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[3] The Court of Appeals' opinion also intimates that production of the S.A.R. was sought only under Rule 16(a)(1), FED. R. CRIM. P. (App. at 18a). The record clearly discloses that a proper request for the S.A.R. was made under the Jencks Act. (Tr. 262-263, 283).

REASONS FOR GRANTING THE WRIT

1. The Decision Below Constitutes a Clear Misconstruction of the Single-Inspection Rule of Code Section 7605(b) and Dangerously Undermines Its Protective Purposes.

Section 7605(b) of the Internal Revenue Code unequivocally provides that,

> . . . only one inspection of a taxpayer's books of account shall be made for each taxable year . . . unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

The statutory limitation on repetitive examinations is a vital safeguard against abuse of examination powers by field agents of the Internal Revenue Service, and is not merely a procedural technicality. Congress first responded to the need for limiting examination powers of Internal Revenue Service agents by enacting the single-inspection rule as part of the Revenue Act of 1921. 42 Stat. 310. In reviewing the background of this enactment, the Court in *United States* v. *Powell,* 379 U.S. 48 (1964), quoted from the legislative history to show that Congress sought to shield taxpayers from the burden of repetitive inspections and to prevent invasions of their privacy by agents "who perhaps are overzealous or do not use the best of judgment in the exercise of their functions." 61 CONG. REC. 5202 (1921) (remarks of Senator Penrose), quoted at 379 U.S., at 54. As stated by the Court in *Powell:*

> Congress recognized a need for a curb on the investigating powers of low-echelon revenue agents, and considered that it met this need simply and fully by requiring such agents to clear any repetitive examination with a superior. [379 U.S., at 55-56.]

Congress realized that in certain appropriate circumstances the Government should be entitled to reexamine a taxpayer's books and records, and concluded that a proper balance between the rights of taxpayers and the needs of the Service could be attained by requiring all additional examinations to be approved by Service personnel in positions of higher responsibility.

Petitioner's books and records relating to the year 1963 had been fully examined during the Internal Revenue audit that was concluded in 1966. For Internal Revenue purposes, this was a "closed case." Nevertheless, in the fall of 1969 various revenue agents conducted a second examination of the same books and records for the same year without the higher authorization and written notice required by section 7605(b), as well as by the published procedures of the Internal Revenue Service.[4] The Court of Appeals found no violation of section 7605(b) by reading into the flat prohibition of the statute exceptions which have no foundation either in the letter or the spirit of the single-inspection rule.

The Court's principal error was to interpret section 7605(b) as requiring authorization for a second inspection only where it is being made specifically to redetermine the taxpayer's liabilities. Since the second examination of petitioner's books and records was made in the course of an investigation formally directed at third persons, the Court concluded that there had been no violation of the single-inspection rule. The carving out of such a third party exception presupposes that

[4] Under Internal Revenue procedures in effect in 1969, written authorization for such a second inspection was required to come from the Regional Commissioner. Rev. Proc. 68-28, 1968-2 Cum. Bull. 912, superseded by Rev. Proc. 72-40, I.R.B. 1972-37, p. 40.

section 7605(b) is aimed only at repetitive examinations of tax liabilities, rather than at repetitive inspections of books and records. This view does not represent a settled or well considered judicial construction.[5] More importantly, it does not accord with the evident purpose of the statute to relieve taxpayers from the burden and intrusion that necessarily accompany repetitive inspections regardless of whose tax liability is involved. As Senator Penrose noted in the floor debate on the predecessor to section 7605(b), the abuses that the statute was to guard against were "repeated visits of tax examiners" and "unnecessary visits and inquisitions after a thorough examination is supposed to have been had." 61 CONG. REC. 5202 (1921), quoted in *United States* v. *Powell*, 379 U.S. 48, 54 (1964).

Section 7605(b) is primarily concerned with privacy, not liability.[6] A taxpayer whose tax liability is *not* being investigated a second time is entitled to the same freedom from intrusion as one whose tax liability *is* being examined a second time. There is no justification for differentiating between the privacy interests of the two. Moreover, where the Service is not concerned with a taxpayer's liability, there is all the more

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[5] *See Hubner* v. *Tucker*, 245 F.2d 35, 38-39 (9th Cir. 1957); *United States* v. *Howard*, 360 F.2d 373, 380 (3d Cir. 1966). *But cf. Martin* v. *Chandis Securities Co.*, 128 F.2d 731, 735 (9th Cir. 1942). In *Hubner* and *Howard*, the decisions relied on by the court below, only cursory attention was given to the scope of section 7605(b) and in both cases the Internal Revenue summonses were found invalid on other grounds.

[6] This distinction is reflected in Internal Revenue Service procedures. The requirement of special authorization for a second inspection is not limited to the situation where the Service has reopened a closed case. See Rev. Proc. 72-40, I.R.B. 1972-37, p. 40.

reason to protect him against "repeated visits of tax examiners" as well as the significant inconvenience and often substantial cost of producing copies of his records and books of account.

Section 7605(b) does not frustrate the legitimate needs of the Service to make a second inspection of the books and records of a taxpayer, whether or not his tax liability is being investigated. The statute merely imposes the reasonable requirement that an agent obtain clearance from a superior and that written notice of the necessity for the additional inspection be served upon the taxpayer whose records are being reexamined. This administrative prerequisite is the only safeguard a taxpayer has against the burden and intrusion of repetitive examinations.

By holding that section 7605(b) protects a taxpayer against repetitive inspections only where the Service has instituted a formal investigation of his liability, the decision below gives revenue agents *carte blanche* to reexamine a taxpayer's books and records for any purpose, whenever a formal investigation of someone else has been instituted. The Court of Appeals apparently believed that Congress was principally concerned with repetitive inspections aimed at determining additional tax liabilities. However, a broad exception allowing unauthorized second inspections whenever an investigation of a third person is in progress would threaten to defeat even this limited purpose by opening the door to circumvention.

This danger is graphically illustrated by the facts of this case.

Petitioner was no peripheral figure in the interrelated investigation of Mayor Bluthardt and the Pa-

paneks. Mayor Bluthardt was suspected of receiving unreported income as consideration for the rezoning of petitioner's River Road property. Petitioner was in fact referred to as "the taxpayer" in the workpapers of Revenue Agent Seto, who was investigating Mayor Bluthardt. The Papaneks, who sold the River Road property to petitioner, were suspected of having underreported the amount they realized on the sale. By the Government's own admission, Special Agent Popovits knew that if he were wrong in his suspicion about the Papaneks, then petitioner had overstated his cost basis and understated his gain. Popovits already had reason to suspect petitioner on the basis of the workpapers from the audit of petitioner for 1963. In apparent recognition of petitioner's direct involvement in the investigation, Popovits gave petitioner a full battery of *Miranda* warnings at their first meeting on November 17, 1969.

The investigations of Mayor Bluthardt and the Papaneks were clearly carried on as a coordinated effort, and petitioner was the critical link between the two. On November 18, 1969, Agent Seto secured additional records from petitioner's accountant as part of the Bluthardt investigation and, on the same day, turned certain of petitioner's records over to Special Agent Popovits, who was then ostensibly investigating the Papaneks. Special Agent Oshiro participated in both investigations.

In short, petitioner was a pivotal figure in these investigations, and the various agents were well aware of the possibility that he had understated his income and might be subject to criminal prosecution. Although it has not been shown that the investigations of Bluthardt and the Papaneks were mere subterfuges for

the investigation of petitioner, the notion that the agents were not "investigating"—within the meaning of section 7605(b)—petitioner's tax liability for the year 1963 borders on the incredible. An accurate determination of petitioner's total investment in the property was necessarily an integral part of these investigations. Thus, the facts of this case make clear that the single-inspection rule of section 7605(b) provides illusory protection for taxpayers if it is limited to the situation where a taxpayer's liability is being formally investigated.[7]

The Court of Appeals further held that section 7605(b) was inapplicable because petitioner's books and records were in the possession of his accountant at the time of the 1969 inspection. The cases cited by the Court of Appeals simply do not support this conclusion.[8] The reason is clear. The burdens and possible harassment to which a taxpayer is subjected by unauthorized, repetitive examinations by field agents—the very burdens and harrassment Congress sought to

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[7] The reference in the opinion of the Court of Appeals to *Norda Essential Oil & Chemical Co.* v. *United States*, 230 F.2d 764 (2d Cir.), *cert. denied*, 351 U.S. 964 (1956), is wholly inapposite. The court there held that the Service could inspect a taxpayer's books for closed years in order to determine his liability for a year for which there had been no prior audit. In this case, the Service has not sought to reexamine petitioner's books and records for 1963 in order to ascertain his tax liability for other years.

[8] There is language in *Hinchcliff* v. *Clarke*, 371 F.2d 697 (6th Cir.), *cert denied*, 387 U.S. 941 (1967), arguably supporting the proposition advanced by the court below. However, the decision in *Hinchcliff* turned on the fact that "few if any" of the documents turned over to the Service by the accountant represented the taxpayer's "books of account," and the court ruled that the Service could not examine any documents found on remand to be the taxpayer's books of account. 371 F.2d, at 700-701.

curb—are neither avoided nor mitigated by a mere physical transfer of the books and records which are subjected to such repeated examination. This is particularly true where, as here, the reexamination of books and records is coupled with personal interrogation of the taxpayer at his home.

It should be noted that this Court's recent decision in *Couch* v. *United States,* 41 U.S.L.W. 4107 (Jan. 9, 1973), is wholly irrelevant to the scope of section 7605(b). While actual possession bears "the closest relationship to the personal compulsion forbidden by the Fifth Amendment," 41 U.S.L.W., at 4110, it has absolutely no bearing on the statutory rule prohibiting repetitive, unauthorized inspections. And while it may be meaningless "[t]o tie the privilege against self-incrimination to a concept of ownership," *id.,* ownership can hardly be disregarded in applying a statute which limits inspections of "a taxpayer's books of account."[9]

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[9] The Government made two additional arguments below that were not reached by the Court of Appeals. First, it urged that petitioner "waived" his right to object to the unlawful second inspection by acceding to the demand for documents in the Internal Revenue summons. However, it does not appear in any of the cases relied on by the Government that the taxpayer was served with an Internal Revenue summons. Although petitioner could have resisted enforcement of the summons issued to obtain his books and records, this Court recognized long ago that:

> [T]he subpoena is in form an official command, and even though improvidently issued it has some coercive tendency, either because of ignorance of their rights on the part of those whom it purports to command or their natural respect for what appears to be an official command, or because of their reluctance to test the subpoena's validity by litigation.

Cudahy Packing Co. v. *Holland,* 315 U.S. 357, 363-364 (1942). Thus, when a taxpayer obeys an official summons, it cannot be

The unwarranted limitations placed by the Court of Appeals on the single-inspection rule raise basic questions of policy respecting the proper administration of the tax laws. Agents of the Internal Revenue Service possess extraordinarily broad and potentially invasive investigative powers. To prevent abuse and to preserve the Service's reputation for fair-dealing, it is essential that these powers be wielded in strict compliance with the dictates of law. Congress recognized the necessity to restrain the investigative powers of "low-echelon revenue agents," and responded to this need "simply and fully by requiring such agents to clear *any* repetitive examination with a superior." *United States* v. *Powell*, 379 U.S. 48, 55-56 (1964) (emphasis added).

Congress has established a proper accommodation between the interests of the Government and the interests of taxpayers by providing this simple procedure to be followed in all cases. To allow Internal Revenue agents to ignore this procedure in selected classes of cases undermines the design of Congress. Petitioner therefore urges this Court to grant certiorari to correct the lower courts' erroneous interpretation of section 7605(b).

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seriously argued that the has freely and voluntarily consented to the inspection of his books and records.

Second, the Government argued below that documents procured in violation of section 7605(b) should not be suppressed as evidence in a criminal proceeding. The only authority is to the contrary. *Application of Leonardo*, 208 F. Supp. 124 (N.D. Cal. 1962); *cf. Reineman* v. *United States*, 301 F.2d 267 (7th Cir. 1962). Further, it is well established that when a governmental agency obtains evidence in violation of its own published rules and regulations, such evidence will be suppressed. *United States* v. *Heffner*, 420 F.2d 809 (4th Cir. 1970); *United States* v. *Leahey*, 434 F.2d 7 (1st Cir. 1970).

2. The Decision Below Denying Production of the Special Agent's Report Constituted a Patent Misapplication of the Jencks Act and Stands in Clear Conflict With Decisions in Other Circuits.

The Jencks Act, 18 U.S.C. § 3500, compels the Government to produce, upon request by the defendant, any out-of-court "statement" of a Government witness which "relates to the subject matter as to which the witness has testified." Following Special Agent Popovits' testimony for the Government, petitioner made a proper Jencks Act request for the production of the Special Agent's Report ("S.A.R."). The District Court denied the request, and the Court of Appeals affirmed. Neither court determined that the S.A.R. was unrelated to the testimony of the Special Agent, and in light of the District Court's characterization of the S.A.R. as "a broad summary of the entire investigation," such a ruling would have been clearly erroneous.[10] Rather, the Court of Appeals held that the S.A.R. was not a "statement" of the witness within the meaning of the Jencks Act.

The Court of Appeals' interpretation of the Jencks Act is clearly wrong. The Jencks Act broadly defines the term "statement" to mean, *inter alia*, "a written statement made by said witness and signed or otherwise approved by him." 18 U.S.C. § 3500(e). Moreover, decisions in at least five other circuits seem clearly to conflict with the decision below.

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[10] The Government did produce Popovits' memoranda of interviews that he reviewed in his direct testimony. It is well established, however, that the "related to" standard is not limited to factual narratives but extends to any statements relating to the general subject of the witness' testimony. *United States* v. *O'Brien*, 444 F.2d 1082, 1086 (7th Cir. 1971); *United States* v. *Birnbaum*, 337 F.2d 490, 497-498 (2d Cir. 1964); *United States* v. *Borelli*, 336 F.2d 376, 393 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965).

In *United States* v. *O'Connor*, 273 F.2d 358 (2d Cir. 1959), the Second Circuit held that failure to produce for purposes of cross-examination the investigative reports of Internal Revenue agents who testified as government witnesses constituted reversible error under the rule of *Jencks* v. *United States*, 353 U.S. 657 (1957), as codified in the Jencks Act. *See also United States* v. *Jaskiewicz*, 272 F.Supp. 214 (E.D. Pa. 1967) (S.A.R. held to be Jencks Act material). Similarly, in *United States* v. *Meisch*, 370 F.2d 768 (3d Cir. 1966), the Third Circuit held that the Government's failure to honor a Jencks Act request for the investigative report of a Special Agent of the Secret Service was grounds for reversal.

Numerous other cases hold that similar investigative reports by Government Agents are "statements" producible under the Jencks Act. *Lewis* v. *United States*, 340 F.2d 678 (8th Cir. 1965) (report of Bureau of Narcotics undercover agent); *Mims* v. *United States*, 332 F.2d 944 (10th Cir. 1964), *cert. denied*, 379 U.S. 888 (1965) (report of F.B.I. agent); *Holmes* v. *United States*, 271 F.2d 635 (4th Cir. 1959) (report of F.B.I. agent); *cf. Ayash* v. *United States*, 352 F.2d 1009 (10th Cir. 1965); *Lohman* v. *United States*, 251 F.2d 951 (6th Cir. 1958), *cert. denied*, 361 U.S. 923 (1959).

Outside of the Seventh Circuit,[11] no decided case gives the slightest hint that a government agent's report described as "a broad summary of the whole investigation" is anything other than a "statement" of that agent within the meaning of the Jencks Act. The

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[11] *See United States* v. *Lacob*, 416 F.2d 756, 761 (7th Cir. 1969), *cert. denied*, 396 U.S. 1059 (1970); *United States* v. *Keig*, 334 F.2d 823 (7th Cir. 1964).

rule in the Seventh Circuit on this issue is so clearly aberrant that a grant of certiorari followed by summary reversal would appear to be in order.[12]

3. Since Petitioner Was Separately Convicted and Sentenced for Tax Evasion in Violation of Code Section 7201, It Was Plainly Unlawful for Him to be Convicted and Sentenced for the Lesser Included Offense of Filing a Fraudulent Return in Violation of Code Section 7206(1).

Petitioner was separately convicted and separately sentenced under both section 7201 and section 7206(1) of the Internal Revenue Code. Section 7201 makes it a felony punishable by imprisonment for not more than 5 years or by a fine of not more than $5,000, or both, willfully to attempt by any means to evade or defeat any tax. Section 7206(1) makes it a felony punishable by imprisonment for not more than 3 years or by a fine of not more than $5,000, or both, willfully to subscribe to a return, made under penalties of perjury, without the belief that it is true and correct.

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[12] When there has been a patent violation of the Jencks Act, it is open to the Government to urge that the error was harmless. *See Rosenberg* v. *United States*, 360 U. S. 367 (1959). But there is no basis for such a contention here, and no such claim was made below. The Court of Appeals' opinion placed great weight on "Special Agent Popovits' unimpeached testimony [that] he was investigating only the possible criminal tax liabilities of the Papaneks." (App. at 15a). If it could have been shown on cross-examination that Special Agent Popovits also suspected petitioner of tax fraud, the violation of the single-inspection rule would have been manifest (even on the Court of Appeals view of the law), and it would also have been clear that the Special Agent had failed at the appropriate time to give petitioner the warnings required by published IRS procedures. (*Id.; see* IRS News Release No. 949, issued Nov. 26, 1968). Since production of the S.A.R. might well have made it possible to impeach Special Agent Popovits' testimony in this regard, the failure of the District Court to order its production was clearly not harmless.

Where defendants have been convicted and sentenced under both sections 7201 and 7206(1), the Courts of Appeals have consistently set aside the sentence for the lesser included offense under section 7206(1). *United States* v. *White,* 417 F.2d 89 (2d Cir. 1969), *cert. denied,* 397 U.S. 912 (1970); *United States* v. *Lodwick,* 410 F.2d 1202 (8th Cir.), *cert. denied,* 396 U.S. 841 (1969); *cf. Prince* v. *United States,* 352 U.S. 322 (1957). Moreover, recent cases hold that, since a conviction results in consequences collateral to the sentence itself, a conviction for a lesser included offense should be vacated along with the sentence. *See United States* v. *Rosenthal,* 454 F.2d 1252 (2d Cir.), *cert. denied,* 92 S.Ct. 1801 (1972); *Coleman* v. *United States,* 420 F.2d 616 (D.C. Cir. 1969).

The illegality of petitioner's conviction and sentence under section 7206(1) was not urged in the District Court or initially on appeal, but it is a classic example of "plain error" mandating correction on direct review. See FED. R. CRIM. P. 52(b). It was brought to the attention of the Court of Appeals in petitioner's Motion for Recall of Mandate by counsel who had been newly retained, but that court failed to correct the error. It is within the proper province of this Court to correct this manifest error by writ of certiorari.

A grant of a writ of certiorari to the Court of Appeals for the Seventh Circuit followed by a summary reversal would be the normal means for correcting such a plain error. In the instant case, however, the Seventh Circuit appears to have no established rule for dealing with multiplicious punishments, and there is a clear conflict in the circuits with respect to the proper remedy in such circumstances. *Compare United States* v. *Rosenthal, supra, with United States* v. *Lodwick,*

supra. See generally United States v. *Corson,* 449 F.2d 544 (3d Cir. 1971) (*en banc*). In view of the conflict among the circuits and the importance of this issue to the administration of the criminal law, it seems clear that this Court should fully consider and resolve the question of the remedy which is proper in the case of multiplicious punishment. Because of the plain error below, reversal is required, and plenary review may be called for to determine the scope of the remedy.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

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IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1972 — SEPTEMBER SESSION, 1972

No. 71-1678

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERT R. KRILICH,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 70 CR 316
FRANK J. McGARR
Judge

ARGUED SEPTEMBER 22, 1972—DECIDED NOVEMBER 28, 1972

Before SWYGERT, *Chief Judge,* CUMMINGS and SPRECHER, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* In June 1970, a two-count indictment was returned against defendant charging him with income tax offenses. The first count alleged that on his 1963 income tax return he willfully and knowingly made and subscribed statements, verified by a written declaration that they were made under the penalties of perjury, which he did not believe to be true and correct as to every material matter, in that he claimed a net long-term capital gain in the amount of $451,128.88, knowing that

the gain was substantially in excess thereof. This was charged to violate 26 U.S.C. § 7206(1).[1]

The second count alleged that he willfully and knowingly attempted to evade income taxes by filing a false and fraudulent 1963 income tax return disclosing taxable income of $97,718.93, with tax due in the amount of $51,978.89, whereas, as he well knew, his taxable income was $246,942.78, with tax due in the amount of $118,858.54. This was said to violate 26 U.S.C. § 7201.[2]

The indictment was based upon defendant's increase of the cost basis of two parcels of real estate sold in 1963 by including in the basis shown in his 1963 income tax return (a) $95,048.84 owed to Berry Electric Contracting Company ("Berry") for work it had done in the construction of the Lawrencewood Shopping Center in Niles, Illinois, and (b) $200,000 for a supposedly fictitious obligation to install sewers on the property. This would mean that defendant had underreported his long-term capital gains by

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[1] 26 U.S.C. § 7206 provides in pertinent part:

"Any person who—

"(1) *Declaration under penalties of perjury.*—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties or perjury, and which he does not believe to be true and correct as to every material matter; • • •

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution."

[2] 26 U.S.C. § 7201 provides:

"Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

$122,523.76, had understated his taxable income by $58,136.88 and had underpaid his 1963 income taxes by $45,085.59 (Govt. Ex. 17).[3] After a bench trial, defendant was found guilty on both counts, given eighteen-month concurrent sentences and fined $5,000. We affirm.

I. *Sufficiency of the Evidence*

In 1962, defendant purchased 23.6 acres of useable land in Schiller Park, Illinois, from Sam Papanek (and apparently from his brother, John Papanek) for $310,878.03. For purposes of this appeal the Government accepts defendant's figure of $39,231.22 for expenses, resulting in a correct basis for the property of $350,109.25. Defendant now admits that an additional $95,048.84 owed to Berry on a separate transaction "was mistakenly applied" by defendant in computing the cost of this property. This sum was owed to Berry for work done at defendant's Lawrencewood Shopping Center—a different piece of property and a completely unrelated transaction. The cost basis of the Schiller Park property was incorrectly increased in this amount as follows: Defendant's purchase of this property from Papanek was pursuant to an escrow agreement established at the Chicago Title & Trust Company on September 10, 1962.[4] Defendant was to receive the deed for the prop-

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[3] These figures are based on Govt. Ex. 17 which uses $33,031.22 as the amount of expenses Krilich incurred in purchasing the property to arrive at the cost basis of the property. As noted in the text, *infra*, the Government is willing to accept defendant's figure of $39,231.22 as the amount of acquisition expenses for purposes of this appeal. Of course, if the cost basis is increased by $6,200.00, that amount would have to be partially allocated to the two parcels of real estate sold in 1963, and the amounts of long-term capital gains, taxable income, and taxes owing as set forth in Govt. Ex. 17 would correspondingly change and alter the figures given in the text to which this note is attached.

[4] Defendant claimed to be entitled to long-term capital gain treatment on the sale of two portions of this property on the theory that he made a contract to purchase the Schiller Park land from

erty upon deposits of $51,000 and $259,878.03, or a total of $310,878.03.[5] Defendant's first payment in the amount of $51,000 was by his check of September 13, 1962. The escrow agreement provided that the second payment of $259,878.03 could be "proceeds of a loan to be deposited under a separate moneylender's escrow." Defendant and Berry entered into such an escrow agreement on March 11, 1963, and defendant's title was recorded on March 27, 1963. The escrow agreement stated the defendant was about to acquire title to this property and provided that Berry would deposit $259,878.03 in escrow at the Chicago Title & Trust Company to be used to consummate the purchase. In turn, defendant was to issue his promissory note to Berry in the sum of $354,926.87. This amount consisted of the $259,878.03 payment due on the purchase of the land, plus an

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Steven O'Donnell on May 3, 1961, and that the holding period should run from that date. However, O'Donnell never owned the property and in May 1961 was merely anticipating securing title to it, an expectation which never materialized. The contract with O'Donnell never was consummated and Krilich signed an escrow agreement to purchase the property from Sam Papanek in September 1962, under whose terms title would not have passed until $259,878.03 was deposited in March 1963. While we are not concerned with whether Krilich committed an offense in using the May 1961 date (and while the propriety of long-term gain treatment is assumed in the calculations herein), it seems incredible that Krilich would reasonably, or even mistakenly, believe that May 3, 1961, was his acquisition date, especially in view of O'Donnell's disclaimer of ever having owned the property.

[5] The purchase-escrow agreement provided for an additional payment of $140,021.97 on the contingency that a firm, apparently unrelated to the seller or purchaser, deposit certificates attesting to the installation of storm sewers complying with village ordinances and to the rezoning of the property. Defendant has shown no connection between this provision and the $200,000 increase in the cost basis of the north tract of Schiller Park property sold to Parrish in 1963 (see *infra*), nor does he argue that it supports it in any way. Nothing in the record indicates nor does the defendant contend that the contingency ever occurred.

unrelated $95,048.84 owed Berry by defendant for the work Berry had done at the Lawrencewood Shopping Center.

The entries made in defendant's books failed to reflect that the aforesaid $354,926.87 consisted of a $259,878.03 loan and the old debt of $95,048.84. Thus there is an August 31, 1963, entry in defendant's books debiting the Lawrencewood Shopping Center account in the amount of $354,926.87 and crediting the note to Berry in the same amount per the March 1963 agreement.[6]

Thereafter, Herbert A. Maier, an accountant who took care of defendant's and the Lawrencewood Shopping Center's books, discovered that the $354,926.87 was not properly debited to the Shopping Center. Pursuant to defendant's instructions,[7] Maier made an adjusting entry removing the $354,926.87 from the Shopping Center account and entering it in defendant's land account. This adjustment likewise did not distinguish between the $259,878.03 second payment on the Schiller Park property and the unrelated $95,084.84. The total of these two sums was entered in the land ledger account, incorrectly increasing the cost basis of the property by $95,048.84.

In our view, the district court could properly find the $95,048.84 misapplication to the basis of the property to be willful. Unlike us, the district judge as the trier of facts had the benefit of personally judging the credibility of the witnesses tendered by both parties. The amount in question was buried as part of the Schiller Park cost basis, and its true origin was difficult to trace. Defendant was a so-

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[6] The next entry in the journal reflects a repayment of the $259,878.03 to Berry from the proceeds of a sale of six acres of the property to Joseph D. Testa.

[7] The adjustment was labeled in the books as "per RRK," referring to defendant.

phisticated taxpayer, not a "babe in the woods."[8] According to accountant Maier, the entry erroneously including this amount in the cost of the Schiller Park property was made at defendant's direction and therefore marked "Per RRK." The agreement defendant entered into with Berry on March 11, 1963, clearly distinguished between the $259,878.03 which Berry was to deposit for the purchase of the Schiller Park property and other debts owed Berry by defendant. The repayment provisions of this agreement explicitly maintained the same difference, as did the treatment of the funds received from the sale of six acres to Testa (see note 6 *supra*). The addition of the $95,048.84 to the cost of the Schiller Park property gave defendant a present financial benefit in the taxable year 1963. Therefore, it is immaterial that he may have lost the opportunity of including it in the Lawrencewood books for depreciation over a period of years. As the trial judge stated in denying the first motion for acquittal, "I think the allocation as it was actually done gave the taxpayer a significant tax advantage over whether it had been properly allocated in the first place." Furthermore, from Maier's testimony, it would appear that the $95,048.84 had not actually been deleted from the cost of the the Lawrencewood Shopping Center and was included in its depreciation for tax purposes. Finding willfulness in a tax case necessarily often involves a subtle determination. Our conclusion is that the finding here as to the $95,048.84 item was sufficiently supported to warrant countenance.

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[8] Defendant's knowledge of federal income tax law was evidenced, for instance, by Parrish's sole stockholder's testimony that when he was negotiating with defendant for the purchase of eight acres of the property (see *infra*), the defendant insisted that two contracts be entered into—one for the sale of the land with defendant as the seller and one for the installation of certain underground water and sewer improvements with Krilich Builders, Inc. as the contractor—instead of combining both transactions in a single contract, so that defendant could avoid being treated as a developer for tax purposes and thereby be able to qualify for capital gains treatment on the sale of the land.

In April 1963, defendant contracted to sell approximately six acres of the Schiller Park property south of Lawrence Avenue (except the east 250 feet thereof) to Joseph D. Testa for $283,500. Title was conveyed by defendant's land trustee in June 1963. The documents effectuating this transaction do not refer to any obligation of defendant to install sewers of any kind on this tract, although defendant did tell Testa that he had engineering plans relating to the installation of storm sewers along Lawrence Avenue. Subsequently Testa installed his own sewers and water mains and rerouted a diagonal ditch on his property. However, he never agreed that defendant should install sewers on the property, nor did defendant reimburse Testa for his sewer construction. In reporting his gain on the sale of the land to Testa, defendant did not include any amount for storm sewers in computing his basis.

On August 23, 1963, defendant's land trustee of the remainder of the Schiller Park tract contracted to sell approximately eight acres of the property north of Lawrence Avenue (except the east 445 feet thereof) to John Parrish Enterprises, Inc. ("Parrish") for $542,000. The contract made no reference to any obligation of defendant or the trustee to install sewers. A second contract between Parrish and Krilich Builders, Inc. (whose president was defendant) provided that Parrish pay $58,000 for the installation of small sewers and water connections on the property Parrish purchased.[9] These improvements were not those for which defendant claimed he was obligated in the amount of $200,000. Defendant wanted the total purchase price of $600,000 divided into two portions ($542,000 for the sale of land and $58,000 for the installation of sewer and water lines), so that he could obtain capital gains treatment instead of being treated as a developer for tax

[9] The $58,000 was not reported in defendant's personal tax return as part of the sale price because Krilich Builders, Inc., and not Krilich in his individual capacity, was the contracting party.

purposes.[10] Parrish and its sole stockholder, John E. Perisich, had no other contract with defendant or Krilich Builders regarding the Schiller Park property purchased by Parrish.

Defendant's brother-in-law, Allen Sorenson, the Secretary of Krilich Builders, testified that early in 1962 he and defendant had discussed the possibility of enclosing the ditch along the south side of Lawrence Avenue and cutting diagonally across the property eventually sold to Testa. Accordingly, an engineer was hired to prepare drawings concerning the enclosing of the ditch with large pipe at a cost of $165,000 to $200,000. The plans also covered the installation of a storm sewer crossing under Lawrence Avenue. All these plans related to the south side of Lawrence Avenue and involved only storm sewers.

In early June 1964, defendant delivered his books and records to accountant Leon Solomon for the preparation of defendant's 1963 income tax return. Solomon prepared a return, which was never filed, allocating $146,207.15 as defendant's cost of the land sold to Parrish. Solomon testified that when he prepared the return, the last entry on defendant's ledger increasing his cost of the Parrish property by $200,000 was not on the records because Solomon's tick mark was not opposite the $200,000 entry. Solomon used tick marks to identify the entries in the books he used in preparing defendant's return because defendant had complained that Solomon had not reported all 1960 interest deductions the book entries entitled him to in preparing defendant's 1960 tax return, and with tick marks Solomon could identify entries made *ex post facto*. Soon after defendant received a copy of the return prepared by Solomon, defendant told accountant Maier that the basis of the Parrish property should be higher because of a sewer contract connected therewith and presented by defendant

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[10] See note 8 *supra*.

to Maier. Defendant had not previously given this information to Solomon when he prepared the original return. In consequence of this advice, Maier made entries in defendant's books increasing the cost basis of the Parrish property by $200,000. Defendant had Maier rather than Solomon prepare an altered 1963 income tax return reflecting this increase in the cost. This was the return actually filed by defendant.

Defendant's principal argument to support the validity of the $200,000 Parrish property cost increase is his purported contractual obligation to pay Krilich Builders, Inc. $200,000 for sewer work. This argument is based on a very brief contract, bearing a date of September 25, 1963, between defendant and Krilich Builders, whereby he agreed to pay Krilich Builders $200,000

> "to install all underground improvements to the property in Schiller Park, Illinois, as per the Plat of Subdivision attached hereto and marked as Exhibit A; to include all necessary storm, sanitary and water mains, and including the cross under Lawrence Avenue and tying into the main storm creek for services necessary to comply with the Village of Schiller Park."

Exhibit A was missing from the copy of the agreement inspected by the Government and has not been produced by defendant.[11] Nothing in the contract ties the installation of any obligation respecting the already sold Parrish tract. It was never signed by the land trustee, the holder of

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[11] Defendant's brief takes the position that the contract covered the entire tract purchased by Krilich. If so, $200,000 could not be properly assigned to the cost basis of the tract sold to Parrish. Of course, such an improper allocation is not the gravamen of the Government's contention here, but the spuriousness of the contract is.

the legal title to the property, but only by defendant, and on September 29, 1965, during the investigation of his 1963 tax return, defendant advised his accountant Maier that said contract "is void in toto."

The foregoing résumé shows that defendant did not obligate himself to Testa or Parrish to supply any storm sewers. Defendant never made such installations. The purported contract of September 25, 1963, between defendant and Krilich Builders, Inc. does not refer to the storm sewer (an enclosed ditch) south of Lawrence Avenue and single crossing discussed by defendant and the Secretary of Krilich Builders in 1962. It cannot reasonably be interpreted as the consummation of these discussions. Rather, the contract evidently related to totally different improvements on the Parrish tract, for the above-quoted description in the contract so suggests. Moreover, accountant Maier testified that, to the best of his recollection, when defendant presented him with the contract and conversed with him, the contract related either to the Testa or Parrish parcel, and defendant said one of the two properties was worth more because of the sewer, and Maier actually increased the cost of the Parrish parcel by $200,000. If the contract had actually referred to improvements south of Lawrence Avenue, the $200,000 obligation should not have been assigned to Parrish's parcel, and, more importantly, the installation would still have been a "gift" to Testa in any event. Testa installed his own sewers on the south parcel he bought. The trier of fact could properly infer that the contract was spurious because defendant had already sold the south property to Testa and had already contracted to sell the north property to Parrish without in either case assuming any obligation to install sewers. The court was certainly justified in concluding that the contract dated September 25, 1963, was not *bona fide* and was hastily executed or spuriously discovered merely to convince accountant Maier in June 1964 that the cost basis

of the Parrish property should be increased by $200,000. In this respect, it is surely significant that defendant did not exhibit the contract to accountant Solomon who had prepared the initial 1963 tax return showing the cost basis at only $146,207.15, but only tardily presented it to Maier after defendant saw his tax liability as computed in Solomon's return.

In sum, none of the witnesses or documentary evidence submitted by defendant supports the good faith or mere mistakenness of his belated $200,000 addition to the cost basis of the Parrish property. On the contrary, the evidence overwhelmingly supports the trial court's finding of willfulness, which we accordingly sustain as to the $200,000 overpadding.[12]

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[12] Defendant relies on *Herzog Building Corp.* v. *Commissioner*, 44 T.C. 694 (1965), apparently for the proposition that the erroneousness of the $200,000 addition to the basis of the Parrish tract is legally debatable and so concludes he could not possibly have entertained a criminal intent. Of course, nothing in *Herzog* suggests that a sham contract with a third party for sewer improvements could possibly give rise to a legitimate issue with respect to the propriety of the $200,000 basis increase, and to intimate otherwise is ludicrous. Nothing in *Herzog* suggests either that though defendant was under no obligation whatever to install sewers on previously sold property, he could reasonably expect properly to increase the basis of that property by later entering into a sewer contract with a third party benefitting that property, even making the incredible assumption that he was doing that.

Defendant also relies on a passage in *Jefferson Memorial Gardens, Inc.* v. *Commissioner*, 340 F.2d 161, 166 (5th Cir. 1968), stating "that properly estimated costs of improvements to subdivided real estate is a capital expenditure allocable to the basis of the various unsold lots, to be recovered by the developer upon his ultimate sale of the lots." We have no quarrel with that proposition, but even assuming, contrary to supported fact, that defendant acted in good faith, it does not describe what defendant did.

II. *Suppression of Records*

Defendant asserts that his pretrial motions to suppress evidence should have been granted. The matters in question were:

1. 1964-1966 copies of records of defendant and work papers of Internal Revenue Service audit agent Leigh Brown, who had been assigned on December 8, 1964, to examine defendant's personal returns for 1960-1963. His audit closed on July 6, 1966.
2. Krilich's conversation with Special Agent Popovitz on November 17, 1969, in connection with his investigation of the income tax returns of Sam Papanek.
3. Krilich's conversations with Special Agent Popovitz on November 18, 1969, in connection with his income tax investigation of Papanek.
4. Defendant's records submitted by defendant's accountant Schelly to Revenue Agent Paul Seto on September 15, 1969, and on November 18, 1969, under an August 12, 1969, summons concerning the investigation of the income tax returns of Edward Bluthardt, Mayor of Schiller Park. These records related to defendant's Schiller Park property involved in the present indictment.

Defendant claims that these conversations and records were really secured for a criminal investigation of defendant, with the references to the Papanek and Bluthardt tax investigations as "a ruse and a facade" or a "pretense." Apparently the thrust of this claim is that incriminating evidence was obtained in violation of defendant's Fifth Amendment right.

Following the hearings on the motions to suppress, the district judge concluded that Revenue Agent Leigh Brown's

investigation of defendant's civil tax liabilities had closed in 1966 and that these records and work papers were not in any way related to the 1969 criminal investigation of defendant. We fully agree with that conclusion. Special Agent Popovitz testified that the Brown work papers were attached to a memorandum concerning Sam Papanek and his brother John Papanek and were used by Popovitz before November 17, 1969, in investigating Sam Papanek's tax liabilities. It was suspected that in reporting a sales price of $237,000 from the sale of the Schiller Park property to Krilich, the Papaneks had not reported the full amount they had received since subsequent sales of the property from three to six months later brought over $800,000. Sam Papanek was then under a criminal tax fraud indictment concerning his transaction with defendant in 1963; his brother John was later indicted. As part of his investigation, Popovitz was required to determine the true price at which the Papaneks sold the Schiller Park property to Krilich in 1963. Popovitz inspected Brown's work papers for this purpose as a starting point in his investigation.

The November 17, 1969, interview with defendant was in pursuance of the same investigation and was designed to ascertain the correct selling price received by the Papaneks from defendant, the exact date of sale, and the amount for which defendant sold part of the property in August 1963.[13] Since the defendant was given *Miranda* warnings at this interview, he cannot complain that the information he gave was extracted in violation of his Fifth Amendment right not to be compelled to incriminate himself. However, simply because *Miranda* warnings were given does not mean that defendant was a suspect toward whose ultimate conviction the Government's investigation was directed. In this case it appears the warnings were

[13] Special Agent Oshiro accompanied Popovitz to this interview solely to act as a witness.

given out of an abundance of caution because of possible collateral criminal consequences to defendant in the investigation of the Papaneks. As the Government points out, if Popovitz was proved wrong in his hypothesis that the Papaneks underreported the selling price, it was possible that defendant had overstated his basis since he had reported a cost basis of over $600,000 for portions of the property purchased from the Papaneks. But the fact remains that the November 17th interview with defendant was in pursuance of Popovitz' investigation of the Papaneks. It was not until December 2, 1969, that Popovitz requested that a criminal investigation of defendant be opened and not until December 22nd of that year that the investigation was officially opened. Contacts with the defendant subsequent to one of these dates would have to be attended by *Miranda* warnings, but we need not decide between the two since the contacts giving rise to all the matters sought to be suppressed predated both these dates. See *United States* v. *Dickerson*, 413 F.2d 1111, 1112-1113, 1117 (7th Cir. 1969).

On November 18, 1969, Popovitz phoned defendant as a follow-up to his interview the preceding day, but since nothing tending to incriminate the defendant came out of this conversation, we need not be concerned with it in any event.

Also on November 18, Revenue Agent Seto obtained certain records from defendant's accountant Schelly. This request for records was pursuant to an August 12, 1969, Internal Revenue Service summons obtained for the purpose of investigating a third party, Edward Bluthardt, Mayor of Schiller Park, and served on defendant's accountant by Special Agent Oshiro. The testimony at the hearing on the motion to suppress established that Seto and Oshiro were investigating the possibility of additional income taxes due from Mayor Bluthardt on unreported income gained for his assistance in obtaining the rezoning of defendant's Schiller Park property sold to Testa and Parrish.

Defendant's records were summoned in an attempt to trace the suspected transfer of money. Revenue Agent Oshiro obtained records pursuant to the summons on September 15 as well as on November 18, 1969. Since the IRS employees' testimony at the hearing was not controverted, the district court was certainly entitled to conclude that the records obtained on these dates were acquired in connection with the investigation of the federal income tax liability of Mayor Bluthardt and not a camouflage to determine if defendant should be indicted. See *United States* v. *Campione*, 416 F.2d 486, 488-489 (7th Cir. 1969).

Defendant next argues that the November 17, 1969, conversation should be suppressed because the Special Agents in attendance did not advise defendant that they "had the function of investigating the possibility of criminal tax fraud" pursuant to Internal Revenue Service instructions of October 3, 1967 (reproduced in 420 F.2d at 811). However, this regulation requires that such a statement be given only to "persons suspected of criminal tax fraud." At the time of that interview, as shown by Special Agent Popovitz' unimpeached testimony, he was investigating only the possible criminal tax liabilities of the Papaneks. As aforesaid, Popovitz did not suggest a preliminary criminal investigation of defendant until December 2, 1969, and defendant's case was not assigned to a Special Agent until December 22, 1969, so that there was no violation of the Internal Revenue Service's regulations. See *United States* v. *Campione, supra.* In any event, defendant was given the warnings prescribed by *Miranda* v. *State of Arizona*, 384 U.S. 436, at the outset of the November 17th interview.[14] Certainly this would alert him that he might then be suspected of violating federal criminal statutes. No more was required. Cf.

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[14] In contrast, in *United States* v. *Heffner*, 420 F.2d 809 (4th Cir. 1969), the full *Miranda* warnings were not given. *Id.* at 811, 813.

United States v. *Comiskey*, ... F.2d ...., ... (7th Cir. No. 71-1490, 1972); *United States* v. *Campione, supra.*[15]

Defendant's third argument to support his motions for suppression is based on a supposed violation of the one-inspection rule contained in 26 U.S.C. § 7605(b) which provides:

> "No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary."

Defendant argues the first inspection occurred on the occasion of agent Brown's audit closing in 1966 and that books and records of defendant examined between that date and November 18, 1969, were inspected in violation of the statutory rule. As shown, the criminal investigation of Popovitz did not commence before December 2, 1969. The books and records in question were obtained by the Internal Revenue Service on or prior to November 18, 1969, for use in their investigations of the Papanek brothers and Bluthardt. This statute does not apply to third-party investigations, but rather to the records of the taxpayer under investigation. *Hubner* v. *Tucker*, 245 F.2d 35, 38-39 (9th Cir. 1957); cf. *United States* v. *Howard*, 360 F.2d 373, 380 (3d Cir. 1966). The 1969 inspection of defendant's records was not concerned with the re-examination of his liability for a year already audited, so that the one-inspection rule is again inapplicable. See

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[15] *United States* v. *Blue*, 384 U.S. 251, 255, does not support defendant, for the Court stated "Blue would at most be entitled to suppress" evidence secured by the Government in violation of the Fifth Amendment. No violation of the Fifth Amendment occurred in the instant case.

Norda Essential Oil & Chemical Co. v. *United States*, 230 F.2d 764 (2d Cir.), certiorari denied, 351 U.S. 964 (1956).[16] Additionally, the summons was served on defendant's accountant Schelly, and the bulk of the records in question were turned over by him to Revenue Agent Seto. Section 7605(b) has been held inapplicable to a taxpayer's records in the possession of his accountant. See *Hinchcliff* v. *Clarke*, 371 F.2d 697, 700 (6th Cir.), certiorari denied, 387 U.S. 941 (1967); *Buschor* v. *United States*, 316 F.2d 451, 457 (8th Cir. 1963); cf. *Guerkink* v. *United States*, 354 F.2d 629 (7th Cir. 1965); *DeMasters* v. *Arend*, 313 F.2d 79, 86 (9th Cir. 1963). We conclude the statutory one-inspection rule was not violated.[17] We need not decide whether the single inspection rule in 26 U.S.C. § 7605(b) should be enforceable by the exclusion of evidence obtained in violation of it in a criminal case. Cf. *Reineman* v. *United States*, 301 F.2d 267 (7th Cir. 1962). However, it is noted that the proper means for enforcing this conditional statutory right is to challenge the summons at the time compliance is sought. *United States* v. *Powell*, 379 U.S. 48, 58.

III. *Denial of Defendant's Request for Documentary Production*

Under the Jencks Act, defendant sought to inspect the grand jury testimony of government witness Joseph Testa, who purchased six acres of the Schiller Park property from defendant. Pursuant to 18 U.S.C. § 3500(c), the district judge inspected Testa's grand jury statement and

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[16] On the other hand, 26 U.S.C. § 7605 does bar a reexamination in connection with a redetermination of a taxpayer's liability for a year already audited. *Reineman* v. *United States*, 301 F.2d 267 (7th Cir. 1962).

[17] Because 26 U.S.C. § 7605(b) was not violated, it was unnecessary to comply with the notice requirements contained therein and in 26 C.F.R. § 601.105.

concluded that it did not "relate to the subject matter of the testimony of the witness," as prescribed by the statute. A similar determination was made with respect to the grand jury testimony of Special Agent Popovitz. As prescribed by the same statutory provision, we too have examined the texts of these witnesses' grand jury testimony and conclude that the rulings of the trial judge were correct.

Defendant also sought to inspect Special Agent Popovitz' "S.A.R." report, consisting of the summary of his investigation of defendant. However, such a report is not a "written or recorded statement * * * made by the defendant" within the meaning of Rule 16(a)(1) of the Federal Rules of Criminal Procedure under which production was sought. Defendant was given the memoranda of the Special Agent's interviews with defendant, so that he was not prejudiced by the denial ruling.

Finally, defendant claims that it was reversible error to deny production of Agent Leigh Brown's transmittal letter of May 23, 1966, dealing with defendant's civil tax liabilities and transmitting his report of the same date to an IRS superior. As shown by the record, a copy of the report itself was given to defendant's accountant. Since the transmittal letter is not a "written or recorded statement * * * made by the defendant," he was properly denied production under Rule 16(a)(1).[18]

AFFIRMED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

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[18] Neither Popovitz' summary of investigation nor Brown's transmittal letter was a "statement" as defined in 18 U.S.C. § 3500(e) and hence was not producible under the Jencks Act either. *United States* v. *Keig*, 334 F.2d 823, 825 (7th Cir. 1964).

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

November 28, 1972

Before

HON. LUTHER N. SWYGERT, CHIEF JUDGE
HON. WALTER J. CUMMINGS, CIRCUIT JUDGE
HON. ROBERT A. SPRECHER, CIRCUIT JUDGE

No. 71-1678

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

ROBERT R. KRILICH, *Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

December 27, 1972

Before

HON. LUTHER M. SWYGERT, CHIEF JUDGE
HON. WALTER J. CUMMINGS, CIRCUIT JUDGE
HON. ROBERT A. SPRECHER, CIRCUIT JUDGE

No. 71-1678

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

vs.

ROBERT R. KRILICH, *Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS ORDERED that the petition for rehearing in the above entitled cause be and the same is hereby DENIED.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1038

ROBERT R. KRILICH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 470 F.2d 341.

JURISDICTION

The judgment of the court of appeals was entered on November 28, 1972. A timely petition for rehearing was denied on December 27, 1972. The petition for certiorari was filed on January 26, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the "one inspection" rule of Section 7605(b) of the Internal Revenue Code of 1954 barred introduction of evidence relating to petitioner's tax books and records.

2. Whether the Jencks Act required production of a special agent's complete summary of all aspects of his investigation, when he testified only as to his interviews with petitioner.

3. Whether petitioner has been illegally subjected to multiple punishments for a single offense.

STATUTES INVOLVED

Sections 7201, 7206(1), and 7605(b) of the Internal Revenue Code of 1954, 26 U.S.C. 7201, 7206(1), and 7605(b), and the Jencks Act, 18 U.S.C. 3500, are set forth in pertinent part at Pet. 2-4.

STATEMENT

After a bench trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of willfully subscribing, under the penalties of perjury, a false tax return for 1963, in violation of 26 U.S.C. 7206(1), and of attempting to evade tax, in violation of 26 U.S.C. 7201. Petitioner was sentenced to concurrent terms of eighteen months' imprisonment and fined $5,000.

The evidence at trial showed that petitioner fraudulently reduced his reported tax liability for 1963 by taking two separate fictitious deductions, one in the amount of $95,048.84 and the other in the amount of $200,000 (R. 36-37, 63-65, 67; Pet. App. 2a-3a, 11a).[1] Together, these deductions resulted in an understatement of petitioner's tax liability in the amount of $66,879.65 (Pet. App. 2a). Petitioner does not here challenge the sufficiency of the evidence.

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[1] "R." refers to the record appendix filed in the court of appeals.

Petitioner's tax return for 1963 was audited and finally approved by the Internal Revenue Service in 1966 (R. 23; Pet. 6). In 1969, the Internal Revenue Service was engaged in an investigation of the tax returns of Sam Papanek, who had sold to petitioner property which the latter had in turn sold in 1963, and of Edward Bluthardt, who was suspected of receiving bribes in connection with the re-zoning of the property (R. 26; Pet App. 12a). In connection with this investigation, an internal revenue summons was issued on August 12, 1969, to petitioner's accountant for corporate and personal records relating to the purchase and development of the property (R. 12), and the records were produced without any objection from either petitioner or his accountant (R. 24, 58). An inspection of these records led to the initiation of a criminal investigation of petitioner's 1963 return on December 22, 1969 (R. 30). At the conclusion of this investigation, Internal Revenue Service Special Agent Popovits prepared a voluminous Special Agent's Report (S.A.R.), which included copies of documentary evidence, statements and memoranda of interviews with both petitioner and third parties, and a narrative report summarizing the investigation (R. 57-60).

At trial, Special Agent Popovits testified only with respect to his interviews with petitioner; all material in the S.A.R. relating to those interviews was furnished to petitioner (R. 58-60; Pet. App. 18a). Petitioner requested production of the entire S.A.R. and the district court, after an *in camera* inspection, denied that request (*ibid.*). The district court also denied petitioner's motions to suppress the records which his accountant had furnished to the Internal Revenue Service in connection with the Papanek and Bluthardt investigations (R. 6-12, 34).

The court of appeals affirmed (Pet. App. 1a-18a),

holding that the evidence "overwhelmingly" sustained the conviction (Pet. App. 11a), that petitioner's motions to suppress were properly denied (Pet. App. 12a-17a), and that the petitioner's request for documentary production was also properly denied (Pet. App. 17a-18a).

ARGUMENT

1. Petitioner contends (Pet. 10-17) that since his tax books and records were first inspected in connection with the audit which concluded in 1966, the inspection made in 1969, in the course of the investigations of Papanek and Bluthardt, was a second inspection barred by 26 U.S.C. 7605(b),[2] and that the proper means of enforcing that provision should have been the exclusion of the books and records at trial. This contention is erroneous for two separate reasons.

First, the 1969 inspection of petitioner's books and records did not subject him to "examination or investigations" within the meaning of Section 7605(b): that provision does not bar a second inspection of a taxpayer's records when the purpose of the inspection is the determination only of the liability of a third party and not of the taxpayer. *United States* v. *Howard,* 360 F. 2d 373, 380 (C.A. 3); *Bouschor* v. *United States,* 316 F. 2d 451, 457 (C.A. 8); *Hubner* v. *Tucker,* 245 F. 2d 35, 39 (C.A. 9). The purpose of Section 7605(b) was to prevent harassment of taxpayers whose returns had already been fully audited, but it was not intended to frustrate legitimate investiga-

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[2] Section 7605(b) states: "No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate * * * notifies the taxpayer in writing that an additional inspection is necessary."

tions into the liabilities of third parties.[3] Conversely, Section 7605(b) was not intended to hamper ordinary audit where a taxpayer's books had already been inspected in the course of an inspection of a third party's returns. The courts therefore have properly excluded such third party inspections from the ambit of Section 7605(b).

Second, even assuming that the 1969 inspection technically violated Section 7605(b), because neither the Secretary nor his delegate informed petitioner that a second inspection was "necessary," that technical violation should not result in the suppression or exclusion of evidence, especially in the absence of any contemporaneous objection. Petitioner's failure to assert his objection promptly when the summons was issued constituted a waiver of the requirement of a written notice of necessity. See, *e.g.*, *Rife* v. *Commissioner*, 356 F. 2d 883, 887 (C.A. 5); *Lessmann* v. *Commissioner*, 327 F. 2d 990, 996 (C.A. 8). Technical objections to the sufficiency of a subpoena should be made promptly in order that minor deficiencies may be corrected. *McPhaul* v. *United States*, 364 U.S. 372, 379; *United States* v. *Bryan*, 339 U.S. 323, 332-333. Petitioner's appropriate remedy was to contest the summons. Taxpayers should not be given the privilege of concealing their objections to summonses in order to defeat a subsequent prosecution.

2. Petitioner contends (Pet. 18-20) that the "S.A.R." related in its entirety to the subject matter of the special

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[3] Typically such investigations will be conducted by agents who are unaware of any previous inspection of the taxpayer's records. The implication of petitioner's argument is that the Internal Revenue Service should maintain more elaborate data banks in order to insure that no agents will unwittingly issue a summons to a taxpayer who has some relationship to the transactions being investigated but whose records were once inspected in an audit of his own tax return.

agent's trial testimony and was therefore producible under the Jencks Act. However, the district court reviewed the S.A.R. *in camera* and concluded that the only portions which related to the special agent's testimony had already been furnished to petitioner and that production of the remaining portions was not required. The court of appeals agreed. Further review of that essentially factual determination is not warranted. Petitioner's contention may rest on the assumption that the Jencks Act requires production of any written statement, made by a witness, which relates generally to the prosecution's case. But the Jencks Act has not been so broadly construed. See, *e.g., United States* v. *Lacob,* 416 F. 2d 756 (C.A. 7), certiorari denied, 396 U.S. 1059; *Oertle* v. *United States,* 370 F. 2d 719 (C.A. 10), certiorari denied, 387 U.S. 943; *United States* v. *Keig,* 334 F. 2d 823 (C.A. 7). And the only case cited by petitioner requiring production of a S.A.R., *United States* v. *O'Connor,* 273 F. 2d 358 (C.A. 2), was decided in the context of broadly ranging testimony by special agents covering all aspects of their investigation; as pointed out above, the testimony given by the special agent in the instant case was more narrowly focused and did not cover all matters discussed in the S.A.R.[4]

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[4]Petitioner contends (Pet. 20, n. 12) that the alleged violtion of the Jencks Act was not harmless. However, he fails to establish how the S.A.R. could have been helpful other than as possibly providing evidence that the "one inspection" rule of Section 7605(b) had been broken. But as we have shown (p.5, *supra*), petitioner's only remedy against an alleged abuse of the summons power was a contemporaneous challenge to the validity of the summons, and information acquired from a S.A.R written long after the enforcement of the summons obviously would be irrelevant to any attempt to assert that remedy. Thus even if production of the S.A.R. was required under the Jencks Act, the denial of petitioner's request for production was at most harmless error.

3. Petitioner contends (Pet. 20-22) that his convictions under Sections 7201 and 7206(1) illegally subject him to multiple punishments for a single offense. However, petitioner's sentences were concurrent; he has not in fact shown multiple punishments.[5]

This contention was first raised after entry of judgment in the court of appeals, in the form of a motion for recall of mandate (Pet. 21). Thus it has received no consideration by the district court and was not discussed by the court of appeals in its opinion. Moreover, it presumably was not considered on the merits by the court of appeals: petitioner's basic complaint is to the intructions of the district court permitting the jury to convict him under both counts of the indictment, and his failure to object to those instructions precluded a later assignment of error on appeal (Rule 30, Fed. R. Crim. P.); and since the sentences were concurrent, there was no plain error "affecting substantial rights" which could be noticed by the court of appeals under Rule 52, Fed. R. Crim. P. For the same reasons, the issue is not properly before this Court.

In any event, the separate convictions were appropriate. The elements of the offenses committed by petitioner are separate and distinct: Section 7201 requires an attempt to avoid tax, not a false statement; conversely, Section 7206(1) requires a false statement made under penalties of perjury, but that statement need not affect the actual

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[5] The cases on which petitioner relies, *United States* v. *White*, 417 F. 2d 89 (C.A. 2), certiorari denied, 397 U.S. 912, and *United States* v. *Lodwick*, 410 F. 2d 1202 (C.A. 8), certiorari denied, 396 U.S. 841, both involved consecutive sentences or cumulative fines in excess of the maximum penalties under Section 7201. Petitioner suggests that his multiple convictions may have collateral consequences but is unable to say what those consequences might be.

amount of the declarant's tax liability. Thus neither offense is a lesser offense included within the other. For example, in this case petitioner could have been convicted under Section 7201 without proof that he had signed his return; similarly, he could have been convicted under Section 7206(1) without proof of an attempt to evade tax. Having committed both offenses, petitioner was properly convicted of both.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1973.